STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FORM THE DECISION OF SAGINAW COUNTY
PROBATE COURT OF JUDGE PATRICK J. MCGRAW AND
MICHIGAN COURT OF APPEALS

Floyd Rau, Personal Representative of the Estate of Herbert L. VanConett, Deceased; Joyce Ann Florip; Karen Jean Peterson; and Sandra Lee Parachos,
Plaintiffs-Appellants,
v.
Elizabeth M. Leidlein,
Defendant-Appellee,
-and-
v.
Marianne DuRussel,
Defendant-Appellee.
/

Supreme Court
No. 126758

Court of Appeals
No. 247516

Saginaw Probate Court
No. 01-111943-DE

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BRIEF ON APPEAL BY APPELLEE, MARIANNE DURUSSEL

ORAL ARGUMENT REQUESTED

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(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "Not entirely".

ISSUE II.

DID THE VANCONETTS' MUTUAL WILLS IMPOSE ANY LIMITATIONS ON MR. VANCONETT'S POWER TO TRANSFER A FORMERLY OWNED MARITAL ASSET, IN THE ABSENCE OF EXPRESS CONTRACTUAL OR TESTAMENTARY LANGUAGE TO THE CONTRARY, RESTRICTING THE ALIENATION OF THE REALTY IN ISSUE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "No".

ISSUE III.

WHAT IS THE SOURCE AND NATURE OF ANY RESTRAINT UPON HERBERT L. VANCONETT RESTRICTING OR RESTRAINING HIM FROM DISPOSING OF HIS ESTATE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "None".

ISSUE IV.

IS THERE ANY SECONDARY AUTHORITY FOUND IN HORN BOOKS AND TREATISES DEALING WITH WILLS AND ESTATES THAT SUPPORT THE PROPOSITION THAT A MUTUAL WILL IMPOSES RESTRICTIONS ON THE

SURVIVING SPOUSE'S POWER TO DISPOSE OF ASSETS IN THE ABSENCE OF EXPRESS CONTRACTUAL LANGUAGE OR TESTAMENTARY LIMITATION ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "He found none".

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Appellants answer, "Yes".

Appellee answers, "No."

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DID APPELLANTS' ESTATE HAVE LEGAL STANDING TO SUE APPELLEE, MARIANNE DURUSSEL, SEEKING TO SET ASIDE DECEDENT'S QUIT CLAIM DEED OF MAY 31, 1996 RE: 5224 KING ROAD, BRIDGEPORT, MICHIGAN?

Appellants answer, "Yes".

Appellee answers, "No".

ISSUE VIII.

DID THE INDIVIDUAL APPELLANTS ESTABLISH THE EXISTENCE OF A CONTRACT ALLOWING THEM TO SUE AS THIRD-PARTY BENEFICIARIES?

Appellants answer, "No".

Appellee answers, "Yes".

Statement of Facts

Appellee, Marianne DuRussel (sometimes hereinafter referred to as DuRussel), adopts Appellants' statement of facts supplemented by the following:

1. While the VanConetts' wills (*Appendix 30a and 32a*) stated that they were made pursuant to a contract or agreement between themselves for the purpose of disposing of their property, there is no separate written contract, memorandum, or notes specifying anything other than the language contained in their respective wills.

2. Both wills were drafted by the VanConetts' attorney, F. H. Martin. Each will was witnessed by F.H. Martin and his secretary, Lucy T. Belill (*Appendix 31a and 33a*).

3. After Mrs. VanConett's death on July 18, 1993 (*Appendix 34a*), Mr. VanConett, during May of 1996, requested that Mr. Martin draft a quitclaim deed, which he did, transferring ownership of 5224 King Road, Bridgeport, Michigan from himself to DuRussel and himself as joint tenants with full rights of survivorship with Mr. VanConett retaining a life estate. Mr. VanConett signed that deed on May 31, 1996 in the presence of Mr. Martin and Ms. Belill. That quitclaim deed was recorded with the Saginaw County Register of Deeds Office on June 3, 1996 (*Appendix 36a*).

4. During June of 1996, Mr. VanConett requested that Mr. Martin draft another quitclaim deed transferring ownership of the lot adjacent to 5224 King Road from himself to DuRussel and himself as joint tenants with full rights of survivorship subject to his life estate. That deed was signed by Mr. VanConett, witnessed by Mr. Martin and Ms. Belill, and recorded on June 21, 1996 (*Appendix 55a*).

5. At Mr. VanConett's request, DuRussel deeded the vacant lot back to Mr. VanConett on April 12, 1997 (*Appendix 56a*).

6. Pursuant to the affidavit of Ms. Belill, Mr. VanConett came to Mr. Martin's office on November 8 and 18, 1996 stating that he wanted to change his will. Mr. Martin refused to do

so, stating that Mr. VanConett's will had become irrevocable upon his wife's death (*Appendix 67a-68a*).

7. Pursuant to the affidavit of Terry Beagle, Register of the Saginaw County Probate Court, Mr. VanConett came to the Saginaw County Probate Court on November 19, 1996 withdrawing his original will from the Probate Court, which had been deposited there since March 8, 1989 (*Appendix 63a and 64a*).

8. Appellants acknowledged that Mr. VanConett destroyed his will after removing it from the Saginaw County Probate Court (*Appendix 72a and 115a*).

9. At the hearing on the parties' respective motions for summary disposition held on February 12, 2003, Appellants' counsel stated that Mr. VanConett had come to his office believed to be during November of 1996 requesting all copies of his will. However, Ms. Belill refused his request but made him a photocopy of his will and retained the office copy. The copy of Mr. VanConett's intentionally destroyed will was admitted to Probate on December 11, 2001 (*Appendix 14a, 15a, 21a, and 22a*).

10. That Mr. VanConett executed a subsequent will dated May 28, 1998. Thereafter, he also created a trust with a pour over will which he signed on July 3, 2001. Those documents were drafted by two different attorneys.

11. F.H. Martin and Appellants' counsel, Walter Martin, Jr. practiced law together in the law firm of Martin & Martin during 1989 when the VanConetts' wills were drafted and in 1996 when the quit claims deeds were prepared by F.H. Martin for and executed by Mr. VanConett.

Applicable Law and Legal Argument

ISSUE I.

DID MCL § 700.2514 DISPLACE THE CASE LAW THAT PREDATED THE ADOPTION OF THE ESTATES AND PROTECTED AND INDIVIDUALS CODE, MCL § 700.101, ET SEQ. (EPIC), UNDER MCL § 700.1203(1)?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "Not entirely".

Appellee believes the starting point in answering that question is to ask why MCL 700.140(1) of the Revised Probate Code (RPC) was enacted since the statutory language of both provisions found in EPIC and the RPC are almost identical. The RPC primogenitor statute provided that a contract to make a will or devise, not to revoke a will or devise or to die intestate can be established only by one of the following:

a. Provision of a will stating the material provisions of the contract;

b. Express reference in a will to a contract proving the terms of the contract; or

c. A writing signed by the decedent evidencing the contract. (RPC 700.140(1)(a)-(c), MCL 700.140(1)(a)-(c), MSA 27.5140(1)(a)-(c)).

That RPC provision also provided that the execution of a joint will or mutual wills did not give rise to a presumption of a contract not to revoke the joint will or mutual wills (RPC 700.140(2), MCL 700.140(2), MSA 27.5140(2)).

A writing was required in each of the three aforedescribed statutory methods to create an enforceable contract to make a will. That statutory provision was a substantial departure from previous Michigan case law, which had permitted a proponent to establish the existence of a contract by parol evidence. For example, in Hammel v. Foor, 359 Mich 392, 102 NW2d 196 (1960), the Court held that an agreement to leave property by a will could be established by parol evidence. In Teason v. Miles, 368 Mich 414, 118 NW2d 475 (1962), the Court held that

although proof of an oral agreement to leave property by will for services performed by the survivor may rest on parol evidence if it is performed by one of the parties; however, there was a heavy burden of proof imposed upon the proponent.

Therefore, RPC 700.140(1) tightened up the methods by which contracts concerning succession could be proven by doing away with parol evidence to establish the existence of a contract to make a will and the terms thereof. It also affected the Statute of Frauds by requiring written contracts regarding the making of joint and mutual wills by deleting the part performance exception. That RPC section was adopted verbatim from the provisions of the Uniform Probate Code (UPC) 2-701. The commentary to that section read as follows:

> "It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both. This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence."

When EPIC 700.2514(1)(a)-(c) is set side-by-side with RPC 700.140(1)(a)-(c), one discernable difference besides the effective date is the provision in EPIC stating "a contract to make a will or devise, not to revoke a will or devise, or to die intestate *may* be established only by one or more of the following" while the RPC provision used the word *can* instead of *may* in 700.140(1). Another difference between the statutes is that EPIC 700.2514(2) provided "the execution of a joint will or mutual wills does not *create* a presumption of a contract not to revoke the will or wills" while RPC 700.140(2) used the phrase "does not *give rise* to a presumption". (Emphasis added.)

MCL 700.1203(1) provides that "unless displaced by the particular provisions of this Act, general principles of law and equity supplement this Act's provisions". That section leaves in tact prior legal and equitable decisions that are not in conflict with the provisions of MCL 700.2514(1). Further, both MCL 700.2514(1) and RPC 700.140(1) refer to an effective date of July 1, 1979. I conclude that the use of July 1, 1979 in both the EPIC and the RPC statutes was a reaffirmation of case law since July 1, 1979 dealing with that statute since the statutory language in both of those sections as set forth in EPIC and the RPC are almost identical.

Therefore, Appellee contends that Michigan case law cited by Appellant prior to July 1, 1979 is not the current status of Michigan law. Appellants have only cited four cases subsequent to July 1, 1979, being:

1. Flynn v. Korreffel, 451 Mich 186, 547 NW2d 249 (1996), which dealt with whether a writ of restitution issued by a district court in a land forfeiture case was enforceable. Appellants cited a portion of the footnote which in turn cited 2 Restatement of Contracts 2d § 205, p.99 contained in Justice Levin's dissent.

2. In re McPeak Estate, 210 Mich App. 410, 534 NW2d 140 (1985), which dealt with whether a post-execution adopted child was entitled to an inheritance under a will. In addition to Appellants' quote from that case was the probate court's statement that "a latent ambiguity may be proved by the facts extrinsic to the testamentary instrument". That was the concluding sentence contained in the same paragraph from which Appellants cited their quote.

3. In re Thwaites Estate, 173 Mich App. 697, 434 NW2d 214 (1988), which dealt with whether two sister had made mutual wills leaving a bequest to Lake Superior State University. The paragraph immediately following Appellants' quote went to state:

> "An agreement that mutual wills are to be binding on the survivor cannot be inferred from the identical and reciprocal provisions alone, but must be established by other evidence. Glover v. Glover, 18 Mich App. 323, 324, 171

> NW2d 51 (1969), lv. den. 383 Mich 757 (1969). One seeking specific performance of a contract to leave property by will has the burden of proving the contract. Hammel v. Foor, 359 Mich 392, 398, 102 NW2d 196 (1960); In re Fritz Estate, 159 Mich App. 69, 75, 406 NW2d 475 (1987); Glover, supra. Thus, petitioner is required to prove an actual express agreement and not a mere unexecuted intention. In re Fritz Estate, supra."

4. Carmichael v. Carmichael, cited as 72 Mich 76, 40 NW 173 (1988), however, there was a typographical error, as that was an 1888 case, not a 1988 case.

In summary, Appellee concludes that the case law developed since the adoption of RPC 700.140 can be used in interpreting its sibling EPIC section MCL 700.2514. Further support for that proposition can be found in EPIC 700.1203, which provides that "unless displaced by the particular provisions of this Act, general principles of law and equity supplement this Act's provisions".

ISSUE II.

DID THE VANCONETTS' MUTUAL WILLS IMPOSE ANY LIMITATIONS ON MR. VANCONETT'S POWER TO TRANSFER A FORMERLY OWNED MARITAL ASSET, IN THE ABSENCE OF EXPRESS CONTRACTUAL OR TESTAMENTARY LANGUAGE TO THE CONTRARY, THEREBY RESTRICTING THE ALIENATION OF THE REALTY IN ISSUE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "No".

John G. Cameron, Jr., in Section 7.3 and 7.4, Pages 257-261 of his treatise entitled Michigan Real Property, Third Edition, published by ICLE, discusses a life estate which exists during the life of that owner and terminates on a specified person's death. Life estates may be created either voluntarily by conveyance or by operation of law, such as dower.

MCL 554.7 divides estates into estates in possession and expectancy estates. MCL 554.41 provides that an expectancy estate is either created at the time of the delivery of the grant or at the death of the testator. MCL 554.10 defines a future estate as "an estate to limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a preceding estate, created at the same time". When a future estate depends on a preceding estate, it is termed a remainder interest.

A future estate is either vested or contingent. The relevant portions of MCL 554.13 provide that "they are vested when there is a person in being who would have an immediate right to possession of the lands, upon the ceasing of the intermediate or preceding estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain".

Under Michigan law, vested future estates are preferred over contingent future estates and, in doubtful cases, the estates will be deemed vested. Mr. Cameron concludes that the law favors the early vesting of an estate. In section 7.7 he states,

> "In Michigan, estates of inheritance are termed fee simple or fee...Any fee simple estate owned by a person who dies passes without restriction to his or her heirs at law. See Mandlebaum v. McDonnell, 29 Mich 78 (1874) (page 262).
>
> ...The rights of the holder of a fee simple are very broad. Such an owner may 'not so use his property as to create a 'nuisance', but otherwise he may, if he has the right of possession, make any use of the land, may cut timber, open and work mines, and injure or destroy any parts of the property'. Herbert T. Tiffany, *A Treatise on the Modern Law of Real Property and Other Interests in Land* § 40 (new abr. ed. 1940). A fee simple estate includes oil, gas, and minerals in the soil and, as an incident of ownership, the right to sell, lease, or use the property in any lawful way. Winter v. State Highway Comm'r, 376 Mich 11, 135 NW2d 364 (1965).
>
> All fee simple estates are freely and unlimitedly alienable. Any attempted restraint on this power of alienation is void no matter how short the duration[15] Mandlebaum. A deed or testamentary devise that includes a restraint on alienation vests unrestricted fee simple title in the grantee or devisee. Braun v. Klug, 335 Mich 691, 57 NW2d 299 (1953). See generally Michigan Land Title Standard 5th 9.1 (pages 262-263).
>
> ...The only estate of inheritance, therefore, that has any significance in Michigan today is the fee simple. If no valid remainder is limited on that fee simple, it is a fee simple absolute. MCL § 554.3. When there is a remainder limited on an estate that would have constituted a fee tail, the remainder is valid as a contingent limitation on the fee and vests in possession on the death of the first taker without issue living at the time of that death. MCL § 554.4 (page 263)."

In Section 7.8, Mr. Cameron discusses life estates:

> "A life estate is a freehold estate but not an estate of inheritance. MCL § 554.2, .5. It is an estate in possession. MCL § 554.7-.8. A life estate is one in which the owner of the interest is entitled to possess and enjoy the real estate during his or her own life or during the life of a third person or persons. A life estate to a class collectively creates an estate for one life only – the life of the one who lives the longest. Rendle v. Wiemeyer, 374 Mich 30, 131 NW2d 45 (1964). The remaining portion of the fee simple, other than the life estate, is a remainder. See § MCL 554.11 (page 263)."

[15] The preference for the free alienability of real property interests goes back to early common law.

In order to create a life estate, one must so designate it as a life estate in the conveying document. The document in issue is the last will and testament of Ila R. VanConett (*Appendix 8A-9A*). Nowhere in their respective wills does either party limit the survivor's interest to that of a life estate. Appellants do not have any contract or any other document signed by Herbert L. VanConett agreeing to limit his interest to a life estate held for the benefit of the legatees of his will. The only language cited by Appellants to support their proposition is the paragraph in article fifth of their respective wills which stated as follows:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my husband, HERBERT L. VanCONETT, (my wife, ILA R. VanCONETT) and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common, or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my husband, HERBERT L. VanCONETT, (my wife, ILA R. VanCONETT) shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable." (*Appendix 7a and 9a*)

Appellants have not cited any Michigan cases after July 1, 1979 supporting their contention that Herbert L. VanConett was restricted to a life estate because of the VanConetts' mutual wills. For there to be a life estate, there must be language in the deed or conveyance document reserving or specifying the existence of a life estate. F.H. Martin, who drafted the wills, also drafted the two quitclaim deeds at Mr. VanConett's request after Mrs. VanConett's death. Both deeds contained a reservation of a life estate for Mr. VanConett. Therefore, if the VanConetts had intended that the realty in issue passed to the survivor subject to a life estate, they would have so specified in their wills as was done in the two quitclaim deeds.. Appellee contends that the interpretation of the VanConetts' intent is that the survivor received the realty in issue without any lifetime restrictions.

Appellants have the burden of proving their contractual theory. The Michigan Court of Appeals in the case of In re Fritz Estate, 159 Mich App. 69, 73, 406 NW2d 475, 478 (1987) held that:

> "As was recognized by the trial court, however, satisfaction of § 140 alone does not mandate enforcement of the purported contract. By itself, the decedent's document does not prove the contract. In re Cramer's Estate, 296 Mich 44, 48, 295 NW 553 (1941). One seeking specific performance of a contract to leave property by will has the burden of proving the contract. In re Cramer's Estate, supra, 47, 295 NW 553; Kraus v. Vandevanter, 237 Mich 168, 171, 211 NW 95 (1926). Thus, petitioner was required to prove clearly and convincingly an actual express agreement, and not a mere unexecuted intention. Teason v. Miles, 368 Mich 414, 417-418, 118 NW2d 475 (1962).

What is the extrinsic evidence proving that Herbert L. VanConett and Ila R. VanConett entered into some type of restrictive agreement limiting the survivor to a life estate? As with any contract, there must be a meeting of the minds with each contracting party agreeing to the terms of their contractual obligation. Where is the evidence to support Appellants' conclusion of law? It is not in the wills.

The case of Hammel v. Foor, 359 Mich 392 (1960) dealt with an agreement between a husband and wife to make mutual, reciprocal wills. The Michigan Supreme Court held that the evidentiary burden of proof is upon the plaintiff to show the existence of the contract sought to be enforced, as there is no existing presumption in favor of the execution of a contract regardless of the equities since courts cannot make a contract for the parties when none exists. A contract must be proved and the unexecuted intention of the parties is insufficient to warrant a decree of specific performance.

Mutual wills are contracts. There must be language within the contract that limited Mr. VanConett to a life estate. There is no separate contract or agreement between the VanConetts wherein both stipulated that the survivor would take the realty in issue subject to a life estate. The only documents are the parties' wills. Without more, and considering that Michigan law abhors a restraint on the alienation of realty, Appellants cannot succeed in their argument. At best, the construction of the VanConetts' wills provided for the disposition of the survivor's property to the named will legatees upon his death.

Both wills were drafted by their attorney, F.H. Martin, who prepared their wills pursuant to their directives. The wills are not identical; each will names different legatees. What is Appellants' extrinsic evidence to support their contention of the VanConetts' intent since it is not found in the VanConetts' wills?

After Mrs. VanConett's death during May of 1996, Mr. VanConett requested his attorney, F.H. Martin, to draft a quitclaim deed transferring ownership of 5224 King Road, Bridgeport, Michigan from himself to Appellee DuRussel and himself as joint tenants with full rights of survivorship with Mr. VanConett retaining a life estate. Mr. Martin did so. Mr. VanConett signed the deed in the presence of Mr. Martin and Ms. Belill on May 31, 1996 (*Appendix 36a*).

Subsequently during June of 1996, Mr. VanConett again requested that Mr. Martin draft another quit claim deed, signed on June 21, 1996 (*Appendix 55a*) transferring ownership of a lot adjacent to 5224 King Road from Mr. VanConett to DuRussel and himself as joint tenants with full rights of survivorship with Mr. VanConett retaining a life estate.

The actions of Mr. VanConett's attorney, Mr. Martin, in drafting the wills and quit claims deeds of May and June of 1996 is evidentiary proof of what the VanConetts intended; otherwise, Mr. Martin would not have drafted the two deeds. However, when it came to modifying the dispository provisions of his will, pursuant to the affidavit of Mr. Martin's secretary, Ms. Belill, Mr. Martin informed Mr. VanConett in November of 1996 that he could not modify the terms of his will, as those provisions became irrevocable upon Mrs. VanConett's death (*Appendix 67a*). The foregoing factual scenario does not support Appellants' contention that Mr. VanConett was restrained from disposing of assets during his lifetime.

Since actions speak louder than words, Mr. VanConett's action of requesting that the will's drafter, attorney Mr. Martin, draft both quit claim deeds after the death of Ila R. VanConett and Mr. Martin doing so, supports the conclusion that the VanConetts did not have a contract as

statutorily required preventing Mr. VanConett's disposition of assets during his lifetime nor did the VanConetts so intend. There is no other evidence. Without documentary evidence or the action to support Appellants' contention, the conclusion is that Mr. VanConett was not prevented from disposing of formerly owned, jointly held, marital realty during his lifetime; otherwise, what explanation is there for Mr. Martin's actions, the drafter of the wills and deeds? The only restriction Mr. Martin ever placed upon Mr. VanConett was that he could not change his will after his wife's death. He did not restrict Mr. VanConett's right to dispose of assets during his lifetime. The general rule of law is that "mere conclusions of the pleader may not be placed in the same category with averment of facts, Plassey v. Lowenstein, 330 Mich 525, 528". See Kent v. Bell, 368 Mich 443, 446 (1962).

In summary, Mr. Martin's actions support Appellee's contention that Mr. Martin, who drafted the VanConetts' wills, carried out their intention being that the survivor was free to dispose of formerly jointly owned assets during his lifetime without any restrictions.

ISSUE III.

WHAT IS THE SOURCE AND NATURE OF ANY RESTRAINT UPON HERBERT L. VANCONETT RESTRICTING OR RESTRAINING HIM FROM DISPOSING OF HIS ESTATE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "None".

In order for Herbert L. VanConett to have been restrained, there must be agreed upon contractual language to that effect, which does not exist. The underlying concept of a mutual will is that it is executed pursuant to a contract between the VanConetts disposing of their property in a particular manner, each in consideration of the other. While mutual wills need not be identical allowing each testator to leave all of his property to the co-testator or subject to a restrictive life estate that must be agreed upon between the parties. As set forth in Foulks v. State Savings Bank of Ann Arbor, 362 Mich 13, 106 NW2d 221 (1960) and George v. Conklin, 358 Mich 301, 100 NW2d 293 (1960), a joint will may provide a life estate to the surviving co-testator with the remainder to the parties' chosen beneficiaries. However, it must be so designated or evidence must exist to support Appellants' contention.

Agreements to make mutual wills must meet the same formal requirements as other contracts. Those requirements are (1) a definiteness of terms, (2) adequacy of consideration, (3) contracts affecting wills involving real estate must comply with the Statute of Frauds. See Elmer v. Elmer, 271 Mich 517, 260 NW 759 (1935), Kent v. Bell, 368 Mich 443, 118 NW2d 486 (1962), and (4) when there is a dispute as to the contract's meaning or the language is not clear, we look to other evidence to discern the parties' intent.

1. Terms

As with other contracts, to make wills or testamentary gifts, the essential terms of the contract to make mutual or joint wills must be sufficiently specific to be enforceable. See Kent v. Bell, 368 Mich 443, 118 NW2d 486 (1962).

2. Consideration

The consideration required to enforce a mutual or joint will is essentially the same as that required for ordinary contracts. The predeceased party to the agreement must receive adequate legal consideration before the agreement becomes enforceable against the survivor.

3. Statute of Frauds

Contracts affecting wills, like other contracts, must comply with the Statute of Frauds. When the subject is the disposition of realty, the contract clearly falls within the Statute of Frauds and can only be satisfied by a writing signed by the person to be charged specifying the terms of the parties' contract.

4. Evidentiary Burden of Proof

The burden of proof required for mutual wills is the same as required for contracts to devise and bequeath realty which places it clearly upon the proponent to prove the existence and terms of the agreement by clear and convincing evidence. Appellants' conclusions regarding the interpretation to be given to the VanConetts' wills is neither supported by any language contained in the parties' wills nor is there any extrinsic evidence to support their theory of a restrictive life estate. The wills' language only provided for the disposition of whatever assets Mr. VanConett owned at the time of his death.

ISSUE IV.

IS THERE ANY SECONDARY AUTHORITY FOUND IN HORN BOOKS AND TREATISES DEALING WITH WILLS AND ESTATES THAT SUPPORT THE PROPOSITION THAT A MUTUAL WILL IMPOSES RESTRICTIONS ON THE SURVIVING SPOUSE'S POWER TO DISPOSE OF ASSETS IN THE ABSENCE OF EXPRESS CONTRACTUAL LANGUAGE OR TESTAMENTARY LIMITATION ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellee answers, "None found".

Appellee has found no secondary sources discussing Michigan law subsequent to July 1, 1979 that support Appellants' contention that Herbert L. VanConett was limited to a life estate because the parties had entered into mutual wills.

ISSUE V.

WHICH IS CONTROLLING, PROBATE OR REAL PROPERTY LAW?

Appellee answers, "Real property law".

A similar factual scenario is found in Rogers v. Rogers, 136 Mich App. 125, 356 NW2d 288 (1981) where the Court of Appeals held that since a husband and wife owned entireties property, which passed by operation of law to the survivor, it therefore cannot pass by will. Charles and Faith Rogers were married in 1938. It was a second marriage for each of them. On April 20, 1961, they executed a joint will which provided that upon the death of either of them, all of their property, whether real, personal, or mixed, was to become the sole and separate property of the surviving party for his/her use during the survivor's lifetime; and, upon the survivor's death, the property was to go equally to their respective children.

On March 8, 1969, Charles Rogers died. On September 4, 1981, Faith Rogers delivered a deed to her son and daughter-in-law, who were one of the six parties named in the Rogers' joint will.

On September 29, 1981, Robert C. Rogers, son of the deceased Charles Rogers, and his wife, who were one-sixth devisees under the mutual will, commenced suit against his stepmother, Faith Rogers, claiming that her action violated the terms of the joint will which only provided for her to have a life estate. Plaintiffs sought to have the conveyance of September 4, 1981 set aside and to enjoin Faith Rogers from making any further realty conveyances during her lifetime.

The Eaton County Circuit Court held, after a bench trial, that the April 20, 1961 wills was in fact a joint and mutual will containing an aspect of a contract affecting all of the property that each party owned. Further, the Court held that when Charles Rogers died, a trust was created under the parties' joint and mutual will for the benefit of Faith Rogers during her lifetime and, upon her death, the property was to pass according to the residuary provisions of their joint will.

However, the Court discussed the nature of how the property was held by Charles and Faith Rogers and determined that the Rogers' property was held by them as tenants by the entireties subject to a survivorship interest and passed outside of their joint will. The Court held that the realty was not subject to the parties' joint will and did not pass by virtue of it. The Court concluded that when Charles Rogers died, the farm realty became the sole and separate property of Faith Rogers through her survivorship right. Therefore, she was entitled to transfer and convey it to her son during her lifetime and the plaintiffs had no cause of action.

The Rogers' Court noted that the language employed in the joint will did not clearly indicate an intent to terminate and destroy the right of survivorship inherent in a tenancy by the entireties. Appellant contends that in a true tenancy by the entireties or joint tenancy with full rights of survivorship the ownership of the realty passes to the survivor upon the death of the other party to the deed. Therefore, when property is held by a husband and wife as tenants by the entireties or joint tenants with full rights of survivorship, the realty passes outside of a will's reach and is not subject to probate. The only way that such realty is subject to probate is if the survivor dies owning the realty.

The Rogers' Court held that if all Faith Rogers had was a life estate, then she did not have very much and her interest was not very saleable. The practical effect of a life estate would be to give her children and her stepchildren a virtual veto power over the sale of the farm. Since the farm was the chief asset, the widow would be left indigent and required to work and live on the farm. Therefore, the placement of the realty's ownership in the names of Charles and Faith Rogers subject to a survivorship interest showed that they had intended that, upon the death of either of them, the farm would be solely owned by the survivor.

In support of its conclusion, the Appellate Court cited the case of McLean v. United States, 224 F.Supp. 726 (E.D. Mich 1963) where a claim for recovery of a federal estate tax was dependent upon construction of a joint and mutual will made by a husband and wife containing

the usual provisions leaving the residue to the survivor and providing that the survivor was not to change the will after the death of the other spouse. When the husband died in 1958 and the wife in 1960, the essential issue was whether the surviving spouse received a terminable interest in the real estate owned by them. The McLean Court held that a joint and mutual will did not affect the real property interests of a husband and wife who held it as tenants by the entireties. Upon Mr. McLean's death, the real property passed by operation of law to the surviving spouse. Under Michigan law, property held as tenants by the entireties subject to a survivorship interest as contained in realty passes by operation of law and not by will. While a joint and/or mutual will constituting a contract whereby upon the death of one of the parties the will become irrevocable, that does not change the result that the realty passes by operation of law to the surviving spouse outside of the parties' joint and mutual will.

The Appellate Court also cited the case of Webber v. Webber, 217 Mich 178, 185 NW 761 (1921) in which the Michigan Supreme Court held that the death of Mr. Webber ended his estate in tenancy by the entireties property. That during his lifetime he could no more devise by will than he could by deed. Further, that part of a will giving the defendant a life estate only in property which, at the time that the will took effect she owned in fee, was void and did not divest her of title to the realty nor vest title in the plaintiff. In Rogers, the Michigan Court of Appeals upheld the Eaton County Circuit Court decision determining that by holding ownership of the farm as tenants by the entireties that upon the death of Mr. Rogers sole ownership of the farm vested in Mrs. Rogers by operation of law leaving her free to dispose of the realty as she desired.

Subsequently, the Michigan Court of Appeals, in the case of Kraizman v. Chaims, 1998 W.L. 1991 110, No. 197644, Mich App. June 19, 1998 (an unpublished decision, a copy of which is attached to Appellee's Brief in Opposition to Appellants' Application for Leaver to Appeal). That case dealt with the same issue as in Rogers. In 1985, Arthur and Ida Chaims executed a joint and mutual will leaving all of their assets to the surviving spouse and, thereafter,

to their families and synagogue. A provision in the will declared that the parties would neither change nor annul their wills except by their written agreement. Mr. Chaims died in 1987, and his estate was admitted to probate. However, the bulk of the real estate passed to Mrs. Chaims outside of the will pursuant to her survivorship right. Most of the Chaims' property was held as tenants by the entireties.

From 1987 to the time of her death in 1992, she transferred all of the property to her children. At the time of her death, there was no probate estate because she did not own any assets in her own name. Plaintiffs, being the personal representative of Mrs. Chaims' estate along with other parties, commenced suit against Mrs. Chaims' children alleging that Mrs. Chaims transferred the properties in violation of the contractual provision contained in the parties' joint will. Plaintiffs requested that the Probate Court declare the property transfer void and permit them to recover the assets on behalf of decedent's estate. However, the Probate Court declared that the properties were not subject to the parties' joint will because they had passed to Mrs. Chaims by operation of law. Therefore, she was the sole and rightful owner of the properties and, as such, entitled to transfer that property to whomever she desired. Accordingly, the Probate Court dismissed plaintiffs' action. Plaintiffs appealed the case to the Michigan Court of Appeals.

The issue on appeal was whether a contract contained in a joint will is enforceable in light of the realty being held by the Chaims as tenants by the entireties. The Appellate Court noted that the case was similar to the Rogers decision. Upon reviewing the facts, the Court found that, although a joint will contained a valid and enforceable contract, the language of the will did not suggest an intent to terminate and destroy the right of survivorship inherent in a tenancy by the entireties. Appellants contend that the same is true for realty held as joint tenants with full rights of survivorship. When realty is held as joint tenants with full rights of survivorship, neither party acting alone can encumber or dispose of the remainder interest. See

Snover v. Snover, 199 Mich App. 627, 502 NW2d 370 (1993), Mannausa v. Mannausa, 374 Mich 6, 130 NW2d 900 (1964). The Court held that by placing the property in both names as tenants by the entireties, the couple intended the property to be owned solely by the survivor at the time of the other's death. Accordingly, the property was not subject to distribution by a joint will or otherwise.

The Court agreed with the Probate Court, determining that all of the real property in question had been owned by the Chaims as tenants by the entireties with the exception of two parcels. Upon the death of Mr. Chaims, Mrs. Chaims became the sole and rightful owner of the property pursuant to her survivorship rights and even extended that concept to include their joint bank accounts. Therefore, the Court concluded that Mrs. Chaims was free to dispose of those assets in any way she desired and that right could not be defeated by an alternate distribution in their joint will.

In summary, the realty in issue, pursuant to the Rogers and Kraizman cases, passed by operation of law and not through probate proceedings upon the death of Mrs. VanConett becoming Mr. VanConett's realty in fee simple. As such, he was free to dispose of his realty in any manner he chose during his lifetime.

ISSUE VI.

DOES IT MAKE ANY DIFFERENCE WHETHER THE VANCONETTS HELD TITLE TO THE REALTY IN ISSUE AS TENANTS BY THE ENTIRETY OR AS JOINT TENANTS WITH FULL RIGHTS OF SURVIVORSHIP?

Appellants answer, "Yes".

Appellee answers, "No."

In the State of Michigan, a deed or devise to two persons who are husband and wife creates the presumption of a tenancy by the entireties regardless of whether the grantor so specifies. A tenancy by the entireties is created by a deed to a husband and wife jointly. Goethe v. Gmelin, 256 Mich 112, 239 NW 347 (1931), unless the conveyance is to a husband and wife jointly and not as tenants in common and the deed so specifies. See Dutcher v. VanDuine, 242 Mich 477, 219 NW 651 (1928), MCL 554.44-.45, and the Michigan Land Title Standards 5th 6.5. In the case of Hoyt v. Winstanley, 221 Mich 515, 191 NW 213 (1922), a deed was given which identified the grantees as Jasper Winstanley and Elizabeth J. Winstanley, his wife, as joint tenants. The Court held that created a tenancy by the entireties.

John G. Cameron, Jr., in Volume I of his treatise entitled "Michigan Real Property Law 3rd Edition" published by ICLE, 9.13 discusses the creation of a tenancy by the entireties beginning on page 326:

> "§ 9.13 A tenancy by the entireties is presumptively created when a husband and wife take title to real estate as co-owners. See generally MCLA 554.44-.45; Michigan Land Title Standards 5th 6.5. A conveyance to a husband and wife creates a tenancy by the entireties unless it explicitly indicates that some other kind of tenancy is intended. DeYoung v. Mesler, 373 Mich 499, 130 NW2d 38(1964); Hoyt v. Winstanley, 221 Mich 515, 191 NW 213 (1922); Manwaring v. Powell, 40 Mich 371 (1879). When a conveyance is made to two persons who are husband and wife, they presumptively become tenants by the entireties regardless of whether the grantor specifies it and whether they have the same surname. The fact of the marriage should nevertheless be established of record either in the conveyance or separately. See generally MCLA 554.44-.45, 565.453, Michigan Land Title Standards 5th 6.5."

In Section 9.13, Mr. Cameron further states on page 327:

> "A tenancy by the entireties may be created by (1) a deed to a husband and wife 'jointly', Goethe v. Gmelin, 256 Mich 112, 239 NW 347 (1931); (2) a deed to a husband and wife 'as joint tenants', Hoyt; or (3) a conveyance to a husband and wife 'jointly and not as tenants in common', Dutcher v. VanDuine, 242 Mich 477, 219 NW 651 (1928). See generally Kahn, Joint Tenancies and Tenancies by the Entirety in Michigan – Federal Gift Tax Considerations, 66 Mich L Rev 431, 440-450 (1968). Even though a joint tenancy or a tenancy in common may be created between husband and wife, there must be an express intention to do so. Thus, phrases like 'as joint tenants and not as tenants by the entireties' or 'as tenants in common and not as tenants by the entireties' would have to be included in the deed[17]."
>
> A tenancy by the entireties may arise with respect to a variety of real property interests. Thus, a husband and wife who own a vendee's interest in a land contract will be tenants by the entireties in that real estate. Stevens v. Wakeman, 213 Mich 559, 182 NW 73 (1921). See generally Michigan Land Title Standards 5th 12.4. And a reservation of standing timber to a husband and wife continues to be an interest by the entireties in that real property. In re Morris' Estate, 210 Mich 36, 177 NW 266 (1920). Michigan Land Title Standards 5th 16.6 addresses mortgages held by a husband and wife.

Footnote 17 found on page 339 of Volume I states that "without these phrases, the conveyance will in all likelihood create a tenancy by the entireties".

In this case, the realty in issue was deeded from Mr. and Mrs. Chauncey Carpenter to Herbert L. VanConett, Ila R. VanConett, and Florence H. VanConett as joint tenants with full rights of survivorship and not as tenants in common (*Appendix 35a*). They received the property on June 19, 1956. At that time, Herbert and Ila VanConett were married. Appellee contends that Herbert and Ila VanConett held their interest in the realty as tenants by the entireties. To change that assumption, Appellee contends that the deed should have read "Herbert L. VanConett and Ila R. VanConett, his wife (or husband and wife), as joint tenants and not as tenants by the entireties, and Florence H. VanConett, a single woman, who together own an undivided interest in the realty as joint tenants with full rights of survivorship". When Florence H. VanConett died, the property was then owned by Herbert L. VanConett and Ila R. VanConett as tenants by the entireties and not as joint tenants with full rights of survivorship. There was no language

contained in the deed disproving the presumption that Herbert and Ila VanConett together owned the realty as tenants by the entireties.

In Section 9.14 of Volume I beginning on page 328 through 329 of Mr. Cameron's treatise, he states:

> "§ 9.14 Although a tenancy by the entireties resembles a joint tenancy, it is different in both form and substance. Budwitt v. Herr, 339 Mich 265, 63 NW2d 841 (1954). Unlike a joint tenant, one tenant by the entireties has no interest separable from that of the other. Long v. Earle, 227 Mich 505, 269 N.W. 577 (1936). An estate held by a husband and wife as tenants by the entireties cannot be severed by either party alone. Arrand v. Graham, 297 Mich 559, 298 N.W. 281, reh'g denied, 297 Mich 565, 300 N.W. 16 (1941); Field v. Steiner, 250 Mich 469, 231 N.W. 109 (1930)...on the death of one tenant by the entireties, title falls to the survivor, but by operation of law, not by the statutes of descent. In re Renz' Estate, 338 Mich 347, 61 N.W. 2d 148 (1953); Farmers & Merchants National Bank & Trust Co. v. Globe Indemnity Co., 264 Mich 395, 249 N.W. 882 (1933). As with a joint tenancy, a death certificate, or the equivalent, must be recorded to create marketable title of record in the survivor. See generally MCLA 565.48; Michigan Land Title Standards 5th 6.13...
>
> In Rogers v. Rogers, 136 Mich App. 125, 356 N.W. 2d 288 (1981), the court of appeals noted that since a husband and wife who own property as tenants by the entireties are considered one person, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of the land so held. The court further noted that neither individual has a separate interest in the property which may be conveyed, encumbered, or alienated without the consent of the other, concluding that entireties' property cannot pass under a will."

However, in both joint tenancy with full rights of survivorship and property held by husband and wife as tenants by entireties, the survivor in either type of tenancy becomes the sole owner upon the death of the other co-owner by operation of law. It made no difference how the property was held by Herbert and Ila VanConett because of the survivorship right. Therefore, Herbert L. VanConett became the sole owner in fee simple of the realty after the death of his wife by operation of law. The VanConetts' wills did not affect realty that passed by operation of law.

ISSUE VII.

DID APPELLANTS' ESTATE HAVE LEGAL STANDING TO SUE APPELLEE, MARIANNE DURUSSEL, SEEKING TO SET ASIDE DECEDENT'S QUIT CLAIM DEED OF MAY 31, 1996 RE: 5224 KING ROAD, BRIDGEPORT, MICHIGAN?

Appellants answer, "Yes".

Appellee answers, "No".

Appellee contends that Appellants' estate did not have standing to commence legal proceedings against Appellee since the realty in issue was not part of Mr. VanConett's estate. It had passed by operation of law to Mr. VanConett, which he deeded away during his lifetime. Further, the will upon which the estate relies was destroyed by Mr. VanConett thereby negating Mr. Rau's authority to even act as personal representative (*Appendix 23a and 148a*). Mr. VanConett had executed subsequent wills after the will relied upon by Mr. Rau naming Mrs. Leidlein as his personal representative. However, she never sought to probate either will.

ISSUE VIII.

DID THE INDIVIDUAL APPELLANTS ESTABLISH THE EXISTENCE OF A CONTRACT ALLOWING THEM TO SUE AS THIRD-PARTY BENEFICIARIES?

Appellants answer, "No".

Appellee answers, "Yes".

The individual Appellants contend that they have a cause of action based on a contract they claim is in the will granting them the legal right to sue Appellee as third-party beneficiaries. There is no such contract in either of the VanConetts' wills that prevented or restricted Mr. VanConett from disposing of his realty during his lifetime. Probate Judge McGraw determined that there was no such contract and that the property had passed by operation of law outside of probate (*Appendix 148a*).

What cause of action do the individual Appellant beneficiaries have? Their claim is based on whatever contract is contained in the VanConetts' wills. Alternatively, what evidence is there of the contract interpretation they espouse? There is no support for Appellants' argument that the VanConetts' wills restricted Mr. VanConett from disposing of realty during his lifetime. Where in either will does it restrict the survivor to a life estate for any previously jointly owned realty that went to Mr. VanConett? Where in the will is Mr. VanConett restricted from disposing of his real estate during his lifetime? There is no extrinsic evidence supporting Appellants' restrictive interpretation of the VanConetts' wills. Factual evidence supports Appellee's interpretation of the wills' being that the VanConetts intended that the survivor was not under any legal obligation to preserve the realty in issue for the benefit of the individual Appellants.

Appellants cited the case of In re Thwaites Estate, 173 Mich App. 697, 702; 434 N.W. 2d 214 (1988) which involved MCL 700.140 (effective July 1, 1979), predecessor to MCL 700.2514 (effective April 1, 2000). That case involved a request for specific performance of an alleged contract between sisters to make a bequest to Lake Superior State University. The case defined the

term 'mutual wills'. However, in order for an agreement to involve mutual wills and be binding upon the survivor, it cannot be inferred from identical and reciprocal provisions alone in their respective wills, but must be established by other evidence. A party seeking specific performance of an actual and express agreement and not a mere unexecuted intention to leave property by will has the burden of proving the existence of a contract, see Hammel v. Foor, 359 Mich 392, 102 N.W. 2d 196 (1960); In re Fritz Estate, 159 Mich App. 69, 406 N.W. 2d 475 (1978).

A contract requires consideration. What is the consideration? Mr. VanConett did not receive any benefit from Mrs. VanConett's will regarding the parties' realty that he had not already possessed through their ownership of the realty as tenants by the entireties giving the survivor a fee simple ownership interest. The realty in issue was already jointly owned by the VanConetts subject to a survivorship right when they signed their wills. The realty went to Mr. VanConett upon Mrs. VanConett's death not because of the wills' language, but because of his survivorship right. There was no contractual consideration given by either VanConett to the other.

Where courts have determined that specific performance is required, one party has given consideration to another. What contractual consideration was given to Mr. VanConett by any of the individual Appellants? The VanConetts neither gave nor received any contractual consideration from the other preventing the survivor from disposing of any realty during his lifetime. What contract have the Appellants proven entitling them to specific performance? Appellants seek to avail themselves of MCL 700.2514; however, there is no evidence supporting the existence of a contract as claimed by Appellants giving them the right to sue as third-party beneficiaries. The contract that the individual Appellants must prove is that Mr. VanConett was limited to a life estate; without that, they have no cause of action against DuRussel. The actions of Mr. VanConett and his attorney, F. H. Martin, belie Appellants' argument that Mr. VanConett was prevented from disposing of any realty during his lifetime. The individual Appellants have no legal right to sue DuRussel for specific performance as third-party beneficiaries. While a contract may be contained

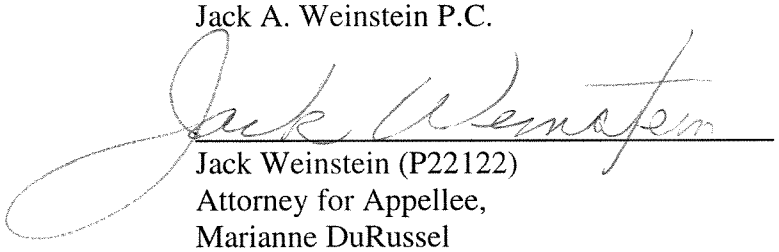
in a will, it is not the will which gives rise to a cause of action; rather, it is the contract. The individual Appellants must prove the contractual terms they advocate based on the language of the contract or extrinsic evidence neither of which exists in support of their third-party beneficiary claim.

Relief Requested

Appellee, Marianne DuRussel, requests that Michigan Supreme Court endorse the findings of fact and conclusions of law of Saginaw County Probate Court Judge Patrick J. McGraw as set forth in his Opinion and Order of February 25, 2003 and deny Appellants the relief they seek.

Respectfully submitted,
Jack A. Weinstein P.C.

Dated: April 12, 2006



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